



sustained a 23 percent whole body functional impairment as a result of the accident, 10 percent of which represented claimant's depression and cognitive problems.<sup>1</sup>

In the September 25, 2000 Award, Judge Benedict determined claimant was permanently and totally disabled from engaging in any substantial and gainful employment. Accordingly, the Judge awarded claimant permanent total disability benefits.

Respondent and its insurance carrier contend the Judge erred. They argue claimant failed to prove she is unable to work as a result of the December 1995 accident and contend none of the three doctors who testified in this claim stated that claimant was permanently and totally disabled. They also argue claimant failed to make a good faith effort to retain or find appropriate work following the accident and, therefore, the Board should impute a post-injury wage of \$7 per hour. Accordingly, respondent and its insurance carrier argue claimant's award of permanent disability benefits should be limited to the stipulated 23 percent whole body functional impairment rating.

Conversely, claimant contends the Award should be affirmed. Claimant argues she sustained injuries to her cervical and lumbar spine, along with a closed head injury, in the December 1995 accident and that she now has cognitive deficits and depression, which contribute to her inability to work. Claimant challenges the contention that none of the doctors stated that claimant was unable to work.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Board finds and concludes:

1. The Board affirms the Judge's conclusion that claimant is permanently and totally disabled as a direct result of her December 9, 1995 work-related accident.
2. As indicated above, on December 9, 1995, claimant slipped and fell in respondent's parking lot. As a result of that fall, claimant sustained a mild brain injury, along with injuries to her neck and back. As a direct result of the accident and resulting injuries, claimant also developed major depression. The parties stipulated that claimant sustained a 23 percent whole body functional impairment due to the December 1995 accident, 10 percent of which was created by claimant's depression and cognitive difficulties.

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<sup>1</sup> June 29, 2000 regular hearing transcript, at page 19.

3. After a failed attempt to return to work for respondent, claimant and her husband moved to Colorado, where claimant eventually treated with Dr. Steven C. Kinnett, a physiatrist, and Dr. Charles Vial, a psychologist. At Dr. Kinnett's request, claimant also saw Dr. Robert A. Kooken, a neuropsychologist, on one occasion for an evaluation.

4. Dr. Kinnett, an authorized treating physician, treated claimant from September 1997 through February 1999. He diagnosed mild closed head injury, myofascial pain syndrome of the neck and cervical paraspinal muscles, sacroiliac joint dysfunction, piriformis syndrome and depression. It was Dr. Kinnett's rating to which the parties stipulated that claimant had sustained a 23 percent whole body functional impairment for both the physical and emotional problems that resulted from the December 1995 accident.

According to Dr. Kinnett, claimant reached maximum medical improvement in October 1998. Regarding claimant's physical ability to work, the doctor restricted her to light work and referred her to the State of Colorado vocational rehabilitation program. But regarding claimant's cognitive ability to work, Dr. Kinnett would defer to neuropsychologist Dr. Kooken. Dr. Kinnett noted, however, that claimant's psychological and physical complaints vary and fluctuate on a day-to-day basis as at times she would appear having a very positive affect but at other times she would be tearful and crying throughout the entire visit.

5. Dr. Kooken saw claimant in April 1998 and evaluated her for her closed head injuries. He diagnosed neuropsychological cognitive problems and depression. Dr. Kooken found claimant had executive cognitive problems, which he testified made it very difficult to do a number of critical work tasks, including shifting one's attention from one task or stimulus to another, making and following through on plans, organizing one's activities into the future and across time, and essentially allowing one to use intellect in the most appropriate way.

Despite those difficulties, Dr. Kooken testified claimant was capable of performing some work in the open labor market, such as repetitive tasks that do not require complex thinking or judgments. In the evaluation report introduced as Exhibit 2 to his deposition, the doctor wrote that claimant should have cognitive rehabilitation therapies if she intended to return to work. The April 27, 1998 report reads, in part:

In my opinion, Ms. Cumberbatch's cognitive problems are clinically significant, and impair her ability to return to work. Her depression is likely to be a reaction to her cognitive problems and consequent life difficulties. The executive cognitive deficits detailed above interfere with her ability to plan an approach to life problems and to follow through on her plans. She is generally temporally disorganized in her activities, with resulting disorganization.

...

If Ms. Cumberbatch intends to return to work in the future, further cognitive rehabilitation therapies are indicated that would be specific to her job duties. As her executive cognitive deficits are severe, repetitions of new skills are necessary for her to commit new information to procedural memory.

Dr. Kooken's office notes also indicate claimant's cognitive problems significantly affect her ability to perform everyday activities. Those notes indicate claimant forgets appointments and what activities she has to do, forgets change and bags when shopping, forgets where she is going, forgets the subject that she is talking about, forgets whether she has added ingredients when cooking, has trouble grasping what is said, confuses people with others, and burns what she is cooking when she tries to multitask.

6. From March 1998 through March 1999, claimant treated with psychologist Dr. Vial. Rehabilitation psychology is one of the doctor's areas of concentration. Dr. Vial diagnosed claimant as having major depression and cognitive problems from the brain injury. The doctor initially testified that claimant was unable to work due to her cognitive problems. Later the doctor testified it might be possible that claimant could perform some job but he could not think of any job that she might be able to perform. And even later, the doctor testified that the best way to determine if claimant could work would be to attempt it.

7. Claimant twice sought vocational rehabilitation services through the State of Colorado. The first vocational rehabilitation plan failed as claimant was unable to successfully complete the courses at a community college that were part of the plan in which claimant would learn new skills. The second vocational rehabilitation plan failed when claimant was unable to complete a trial work assignment that required her to work only three to four hours a day at a sheltered workshop. Claimant's vocational rehabilitation counselor, Laura Baroni, closed claimant's case noting that claimant was too disabled to obtain substantial gainful employment.

8. The Board does not intend to summarize the entire evidentiary record. Nonetheless, there is evidence that supports claimant's contention that she is unable to perform substantial gainful employment as well as evidence that supports respondent and its insurance carrier's contention that claimant retains the ability to work. The Board, however, concludes the greater weight of the evidence establishes that it is more probably true than not that the December 1995 accident and the resulting physical and cognitive problems have rendered claimant unable to perform substantial and gainful employment. The Board is persuaded by Ms. Baroni's testimony that claimant gave a good faith effort in attempting to return to work but failed.

9. The Board concludes claimant is entitled to receive permanent total disability benefits under K.S.A. 44-510c (Furse 1993), which provides, in part:

(a)(2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. . . .

10. The Board adopts the findings of fact set forth in the Award that are not inconsistent with the above.

**AWARD**

**WHEREFORE**, the Board affirms the September 25, 2000 Award entered by Judge Benedict.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant  
Michael J. Haight, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director